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IN THE

Supreme Court of the United States

October Term, 1970

NO. 1358

MARY ELLEN COAKLEY, *Petitioner*

v.

F. M. REISING, ET AL., *Respondents*

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE 13TH COURT OF CIVIL APPEALS OF TEXAS

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement

Petitioner's Brief, page 1, states that the suit here involved was a suit for tax foreclosure. This is erroneous. The suit was a flat rate foreclosure, and the foreclosure was made for failure to pay water rate assessments on the land for several years, which assessments are an operation and maintenance assessments. We have again set out in Appendix A, the majority opinion of the Court of Civil Appeals, Appendix B, the Trial Court's Judgment, including the findings of the jury, and in Appendix C, the Texas Recording Statute, which we believe will be of assistance to the Court.

Jurisdiction

Respondents take the position that this Honorable Court does not have jurisdiction of this cause because no federal question is presented. As this Court said in *Waters-Pierce Oil Company v. State of Texas,* 29 Supreme Court Reporter 220:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court. U. S. Rev. Stat. ss. 709, U. S. Comp. Stat. 1901, p. 575. Nor does this court sit to review the finding of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. Citing cases."

The Supreme Court will not accept jurisdiction unless a substantial federal question is presented. *Honeyman v. Hanan,* 57 Sup. Ct. 350, 300 U.S. 14, *Seaboard v. Watson,* 53 Sup. Ct. 32, 287 U.S. 86, *Zucht v. King,* 43 Sup. Ct. 24, 260 U.S. 174, *Grisanti v. City of Cleveland,* 83 Sup. Ct. 111; 371 U.S. 68, *Lanza v. Wagner* 83 Sup. Ct. 177; 371 U.S. 74.

Respondents submit that this case is an ordinary case involving property rights within the State of Texas. The findings of the Trial Court have resolved the fact issues unfavorably to the Petitioner and this Court, like the Supreme Court of Texas, should not set aside findings

of the jury when such findings have been held to be supported by a sufficiency of the evidence by the Texas Intermediate Court of Civil Appeals.

Petitioner seeks to get jurisdiction of this cause in this Court by giving lip service to the due process and equal protection clauses of the Federal Constitution. Respondents submit that Petitioner has litigated her case through three trials in the State of Texas, and two appeals over a period of some twenty-six years and that the thought of due process or equal protection are afterthoughts on her part only after she has lost her case in the proper tribunals.

Petitioner is not specific in what manner she has been denied due process or the equal protection of the laws under our constitution, and the Appellate Court has failed or refused to certify that a federal question is presented in this cause.

In the case of *Southwestern Bell Telephone Co. v. State of Oklahoma, et al.,* 58 Sup. Ct. Rep. 528, 303 U.S. 206, this Court in discussing the substantial federal question had the following to say:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a Court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

In the case of *Lynch, et al. v. People of New York,* 55 Sup. Ct. Rep. 16, 293 U.S. 52, the Court held that

jurisdiction cannot be determined upon a surmise nor can claim of jurisdiction be sustained by reference to briefs and statements which are not a part of the record, and again, the Court said:

> "Where judgment of the state court rests on two grounds, one involving federal question and the other not, or if it does not appear upon which of two grounds judgment was based, and ground independent of federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

The Supreme Court has no jurisdiction unless a real, not a fictitious, federal question is involved. *McDonald v. Oregon Railroad & Navigation Co.*, 34 Sup. Ct. 772.

To Summarize: Petitioner does not specify the federal question of which she complains and we think that no federal question is raised by the facts. The Appellate Court did not specifically deal with any federal question in its opinion, but disposed of property rights within the state of Texas. The Appellate Court did not certify that any federal question existed in this case. No statute of the state or the effect of any statute on the federal constitution is involved and Respondents wholly fail to perceive any federal question which would warrant this Court in accepting jurisdiction under previous decisions of this court.

We therefore respectfully pray the court to deny the application for the writ of certiorari for lack of jurisdiction.

Statement of the Case

Petitioner alleges in her statement of the case that the Respondents and their predecessors in title were guilty of

covert, champertous and fraudulent arrangements in connection with the Water District's foreclosure procedure which includes the connivings of the parties who were predecessors in title to the Respondents. This statement is not supported by the facts. The Jury found that the predecessors in title to the Respondents were innocent purchasers in good faith of the legal title to the premises and the Texas Court of Appeals held that such findings were supported by the evidence in the case. Petitioner's predecessor in title, the so-called "Iowa hog farmer", never recorded his deed to these lands and premises during his lifetime and the Water District foreclosed their flat rate assessment lien under covenants running with the land against the record owners of the properties, all in accordance with the Texas recording statutes. See Appendix "C", page 37.

J. M. Collins did not record his deed and the Jury found that the Water District had no notice, either actual or constructive of his ownership. Indeed, the evidence shows that J. M. Collins intentionally left his deed off the record, probably with fear that he would be charged with taxes and assessments against the land and he decided to make no claim on the land which might saddle him with so much in delinquent taxes and assessments. He, therefore, purposely or intentionally allowed the Water District to foreclose upon the land without intervention or protest. Now Petitioner herein, his successor in title, seeks to lay claim to the land after the taxes were settled and valuable improvements were made on the property by the purchasers from the foreclosure sale.

The true abstract of title follows this chart.

DATE	THE PLAINTIFF RELIES UPON	THE DEFENDANTS RELY UPON
1-17-27	James R. Page owned land	Same
11-23-24	James R. Page died and will was admitted to probate in Cause No. 1565 in Hidalgo Co. (X010-19) & (X001-9)	Same
11-7-39	Joint request of Mattie A. Phillip E. & James H. Page filed in above probate cause and dividing real estate as follows: To Mattie A. Page - 2/3 To Phillip E. Page - 1/6 To James H. Page - 1/6 (X009A)	Same
8-14-42		Flat Rate Foreclosure Suit (B-13329) filed - (X247-251 incl.)
10-21-42		Judgment entered (X231-2)
12-2-42		Order of Sale issued by District Clerk (X233-6)
1-7-43		Return on order of sale (X237)
1-7-43		Constable's deed to Hidalgo County Water Control & Improvement District No. 1 (X238)
1-18-43		Constable's deed filed for record with County Clerk of Hidalgo County, Texas.

DATE	THE PLAINTIFF RELIES UPON	THE DEFENDANTS RELY UPON
1-28-43		Special Warranty Deed from Hidalgo County W.C.& I.D. No. 1 to Sarah H. Conklin (X-241-3)
2-10-43		Above deed filed for record with County Clerk of Hidalgo County, Texas.
1-28-43		Special Warranty Deed from H.C.W.C. & I.D. No. 1 to F. M. Reising (X244-6)
2-18-43		Above deed filed for record with County Clerk of Hidalgo County, Texas.
1-2-45		Trespass to try title suit (B-14,391) filed by F. M. Reising against H.C.W.C. & I.D. No. 1, et al. and judgment entered in favor of plaintiff on 1-8-45 (X214-20)
1-23-45	Replacement warranty deed (dated 1/19/42 and executed as of 3/24/41) from Mattie Page Coffin (formerly wife of James R. Page, deceased) and husband Erle B. Coffin to Joseph M. Collins filed for record with County Clerk of Hidalgo County, Texas (X026-8)	
3-16-45	Quit-Claim Deed (dated 6/26/43) from William C. Collins to Mary Ellen Coakley filed for record with County Clerk of Hidalgo County, Texas (X087-9)	

DATE	THE PLAINTIFF RELIES UPON	THE DEFENDANTS RELY UPON
3-16-45	Certified copies of Last Will and Testament of Joseph M. Collins and order admitting same to probate in Cause No. 3557, in the County Court of Cameron County, Texas, filed for record with County Clerk of Hidalgo County, Texas (X029-33)	
12-4-45	Quit-Claim Deed (dated 11/27/45) from James H. Page to Mary Ellen Coakley filed for record with County Clerk of Hidalgo County, Texas (X090-1)	
12-4-45	Quit-Claim Deed (dated 11/26/45) from Phillip E. Page to Mary Ellen Coakley filed for record with County Clerk of Hidalgo County, Texas (X092-3)	
11-21-49	Deed (dated 3/22/41) from Phillip E. Page to Mattie Page Coffin filed for record with County Clerk of Hidalgo County, Texas (X020-1)	
11-21-49	Deed (dated 3/22/41) from James H. Page to Mattie Page Coffin filed for record with County Clerk of Hidalgo County, Texas (X022-3)	
8-27-65	Missouri Warranty Deed (dated 3/24/41) from Mattie Page Coffin (formerly wife of James R. Page, deceased) and husband, Erle B. Coffin to Joseph M. Collins, filed for record with County Clerk of Hidalgo County, Texas (X024-5)	

For a concise statement of the facts of the case, see the opinion of Judge Howard P. Green of the Thirteenth Court of Civil Appeals, Appendix "A", page 15.

Petitioner has lost her case in all the state courts. The only question to be resolved in this case was one of notice. Actual notice is a question of fact, and this was answered by the Jury unfavorably to the Petitioner.

Reply to Point Number One

Respondents challenge Petitioner to point out in the record the propositions stated in Point Number One. To begin with, there was no covert acts of private persons to pay for and use the public foreclosure power to seize another man's lands. There was also fair notice and hearing for the record holder of the land for the reason that the municipality had no knowledge of the equitable ownership of the land, if any.

Argument Under Reply to Point Number One

Petitioner complains of unfair notice and says that the land was sold for less than its value and that the landowner had no right to purchase or settle his taxes at $15.00 per acre. The evidence would show that the landowner investigated at the Water District's office and could have received all of the information available if he did not and that he purposely withheld from the Water District's officials notice of his interest in the land.

Petitioner makes a very persuasive argument but her argument does not fit the facts. All persons in Hidalgo

County could settle their taxes for less than the amounts against them but the land in which Petitioner was interested was non-revenue bearing, in brush, overburdened with taxes and considered worthless and was abandoned by the predecessor in title to the Petitioner. This is shown by findings of the jury. See Judgment, Appendix "B", p. 28. Petitioner gets carried away with her rhetoric and makes statements to the effect that no one else had an opportunity to settle taxes for a song and it was unquestionably shown to be a secret private deal for the benefit of strangers to the title. See page 15, Petitioner's Brief. These are wild statements not supported by the facts. The facts were thousands of acres were being foreclosed upon by virtue of delinquent taxes from three governmental subdivisions and they were each filing hundreds of suits and serving each other with notices and each taxing body was waiving and entering appearance in another suit but were intervening in other suits for pro-rata part of the taxes. These suits occurred during the years of the great depression and the district was practically insolvent for inability to collect taxes, the school districts were issuing warrants and were unable to pay teachers, and almost a third of the land of the county were being foreclosed upon in one form or another. All of the people knew that adjustments could be made on taxes because the municipalities were desperate to get the properties back on the active tax rolls. All this is shown on the testimony of Fred K. Abney, Statement of Facts, 251, et. seq. There is not one iota of testimony of any covert arrangements with anyone in the whole record and Petitioner draws all of her inferences from the escrow agreement shown at Appendix D of Petitioner's Brief and also as Exhibits

X-228 and X-229. These escrow agreements, the evidence shows, were entered into with numerous parties concerning any land upon which the District had already foreclosed or was in the process of foreclosing upon which they could find an interested purchaser. From these practical arrangements Petitioner visualizes an unholy alliance of Respondents and contends that the transaction was tainted with fraud.

What Respondents are attempting to say is that they dispute that there is evidence of the proposition that Petitioner assumes in her brief, that is, they dispute that there was: (1) any fraud; (2) any covert arrangements; (3) any champerty; and (4) any attempt to discriminate between persons. In addition to the record, if arguments are set aside, we have the finding of the jury and the approval of the Appellate Court of the findings of these facts.

Again, Petitioner says that the District was renting Collins' land in 1942 and collecting a fee for doing so. See Page 16 of the Petition for Writ of Certiorari. Petitioner does not say where in the Statement of Facts he found this information and we cannot find it. It does appear in the Statement of Facts that the District was renting and endeavoring to make use of non-resident lands that were sitting idle in order that the non-resident owner could realize something from his investment, but we do not find that this is true of any land belonging to Mr. Collins. If the District was renting any lands which may have belonged to Collins, its officers were under the impression that it belonged to the Page Estate.

Reply to Point Number Two

Petitioner under Point Two states that a taxing body who appears as Defendant in a foreclosure suit named as an owner of the land in question has notice of such person's claim, if any, to the title and can not consistently with due process of law foreclose and take such land without making an investigation to determine the heirs or personal representatives of such person.

Argument Under Reply to Point Number Two

In this case it was shown that the State and County as a taxing body filed Suit No. E-719 against the Page Estate and listed one Joseph M. Collins and another Frank Hayes as parties and said suit was filed on seven different tracts of land. It is true that in the seven tracts of land J. M. Collins was listed as a person who might be an owner or claiming an interest but only three tracts of the seven tracts were involved in this suit and the record title to all three tracts showed in the Page Estate. There were altogether five persons listed, Mattie A. Page, Phillip E. Page, James H. Page, Joseph M. Collins, and Frank Hayes. How, then, could a reasonable person know that J. M. Collins had an unrecorded Quit-Claim Deed from the Page Estate to the lands and was keeping such information a secret? Petitioner relies upon this state of facts as a notice as a matter of law and this question was submitted to the Jury under appropriate instruction of the Texas law as to notice. The Jury answered the question unfavorably to the Petitioner as shown in the judgment.

The recording statutes of Texas, see Appendix "C", p. 37, have a specific purpose, i.e., to furnish a place for

a title examiner to look for the claims to the title after an attorney has searched the records and checked with parties in possession and it was only reasonable for an attorney to suppose that he has a list of the proper claimants to the land when he has checked the records in the office of the County Clerk and has made the record title owners parties to the suit. The Jury has found against Petitioner in this regard and this Court ought not to disturb the Jury finding. *Waters-Pierce Oil Co. v. State of Texas, supra.*

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the application for certiorari be, in all things, denied for the following reasons:

1. Lack of jurisdiction of this Court.
2. Lack of merit in the application.

Respectfully submitted,

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By E. G. Henrichson
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APPENDIX "A"

NUMBER 548

IN THE COURT OF CIVIL APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS SITTING AT
CORPUS CHRISTI, TEXAS

MARY ELLEN COAKLEY,
Appellant,

V.

V. N. CROW, ET AL,
Appellees.

On Appeal from the 93rd District Court of
Hidalgo County, Texas.

OPINION

Mary Ellen Coakley, appellant, sued F. M. Reising and others in trespass to try title to recover a seventy acre tract of land in Hidalgo County, Texas. She also sued Sarah H. Conklin and others to recover a tract of about thirty-eight acres, also in Hidalgo County. The two cases were tried together in a jury trial, since they concern the same chain of title. Plaintiff Coakley claims title by reason of (1) a 1941 deed from Mattie Page Coffin (wife at the time of his death of the common source, James R. Page, deceased) and her husband Erle B. Coffin to Joseph M. Collins, (2) Joseph Collins' devise of the property to Will Collins, and (3) a 1943 deed from Will Collins to

plaintiff. The defendants are in possession and claim by force of a 1942 default judgment of foreclosure by Hidalgo Water District No. 1 and a constable's deed to the District. The Water District then conveyed the two tracts of land to the defendants or their predecessors in title. The District's foreclosure suit was brought against Mattie Page Coffin and her sons, they being the record owners in 1942 of the property since the deed from Mrs. Coffin and husband to Joseph Collins was not at that time of record. Will Collins, the devisee under Joseph M. Collins' will, was not named as a party to the foreclosure suit. See, on former appeal, Coakley v. Reising, et al, Tex. Sup., 436 S.W.2d 315.

This cause has been pending in the courts since 1947. Three trials have taken place. The Reising case was tried before the court on title issues in September, 1949, resulting in a judgment for the plaintiff which, however, was set aside on plaintiff's motion. The cases remained on the docket for many years, and were tried jointly in May 1966. At the end of this trial the case was dismissed before submission of special issues to the jury when defendants' motion that plaintiff had sued in the wrong capacity was sustained. Upon appeal, this judgment was set aside by the Supreme Court and the case was remanded for trial. Coakley v. Reising, et al, supra.

Upon the instant trial, a take nothing judgment was entered by the trail court on October 29, 1969, based upon jury findings. Plaintiff's motion for new trial was overruled and the case is now before this Court on appeal.

The history of the events out of which the litigation arose, and the contentions of the parties as to their respective claims of title, are set forth in Judge Pope's

opinion on the former appeal, 436 S.W.2d at pp. 316-317, to which reference is here made. Any additional facts or matters of evidence will be discussed under the pertinent points of error.

Appellant-plaintiff Coakley contends (1) that the Water District officials had actual notice as a matter of law of the Collins' title and that the evidence was legally and factually insufficient to raise an issue of fact of the absence of such notice, and (2) that the judgment of foreclosure was illegal and void.

Appellant also asserts various errors in connection with the court's charge, in the rulings on introduction of evidence, and she also raises the claim of jury misconduct.

Appellant's first two points of error assert in substance that the evidence proved as a matter of law that officials of the Water District had notice that Mattie Page Coffin had conveyed the lands in question to J. M. Collins, and that the jury findings to the contrary did not find support in the evidence, and were contrary to the overwhelming weight of the evidence. To these points appellees reply that the findings of the jury on the notice issues were supported, both legally and factually, by the evidence.

The applicable law with reference to actual notice of an unrecorded title is stated in the Supreme Court's opinion on the former appeal of this case, supra (436 S.W.2d on p. 318) thusly:

> "It was Mrs. Coakley's theory that the Water District had actual notice that Will Collins, her predecessor, owned the land even though the title documents were not recorded. She contends the Water District failed to join him in the foreclosure suit, his title was not

foreclosed, and the Water District judgment was void as to him.

(3, 4) It is settled by Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951) and other cases cited in that opinion, that a judgment by a taxing agency is not binding upon a person who is not a party to the suit, when his ownership is evidenced by an unrecorded document, *if the taxing authority has actual or constructive notice of his title or ownership.*[1] Persons 'actually or constructively known to have an interest in the land should be joined as parties' in a tax foreclosure suit. 54 Tex.Jur.2d, Taxation, §163; Scales v. Wren, 103 Tex. 304, 127 S.W. 164 (1910). Unless this is the rule, the taxing authority could bring suit and serve process, as plaintiffs contend was done in this case, upon those who have already parted with title and are not the least interested in the suit. Hunt v. States, 110 Tex. 304, 217 S.W. 1034 (1920)."

Of course there were no jury findings on the issue of notice in the former trial, since the suit was ordered dismissed by the trial court before submission of the jury. The Supreme Court, in overruling requests of both parties to decide the issue of notice as a matter of law and render judgment, held, in addition to its holding that the plaintiff could sue in her individual capacity, that the evidence then before the Court created jury fact issues on the question of notice, and reversed and remanded.

On the trial from which the instant appeal was taken, the jury returned negative answers to all special issues inquiring whether, from a preponderance of the evidence,

1. Emphasis added. No contention of constructive notice is made by appellant.

they found that certain named Water District officials or either of them had actual notice in law, as that term was defined in the charge, of the deed from Mrs. Mattie Page Coffin to J. M. Collins, and (separate issues) whether such officials had such notice that Will Collins was successor in interest of Mrs. Page and J. M. Collins to the lands in question. We find, from a study of the briefs and the statement of facts, that such findings have support in the evidence, and are not contrary to the great weight and preponderance of the evidence.

Will Collins, prior to the filing of the foreclosure suit, had made a trip to Hidalgo County, and there was evidence that he had shown interest in certain properties, and that he had conversed with officials of the district about some of the land. However, such evidence did not more than raise fact issues as to any claimed conversation with District officials about any title interest in the property in question, since any knowledge of any conversations of any title claims by Collins was denied by the officials involved. Correspondence between the Collins and District was in evidence, but we do not construe such correspondence as informing District or its officials of any title claims to this land.

As conclusively establishing as a matter of law notice of Collins' claims of title to these tracts, appellant relies principally on proof of a tax suit brought by the State of Texas on December 22, 1941, against various defendants including J. M. Collins on seven tracts of land, including, among others the tracts here involved. The Water District was named as a defendant, and executed a waiver of service and acknowledgment of a receipt of a copy of plaintiff's petition. Although this was evidence to be con-

sidered along with other testimony of notice by the District of Collins' ownership, it did not establish such notice as a matter of law. See discussion on former appeal, supra, 436 S.W.2d on p. 318. Collins had nothing on record in Hidalgo County to evidence any claim of title. He had exercised no rights of possession of the property. Other tracts besides the ones here involved and other defendants besides Collins, were included in the State's suit, and there were no allegations of any claim of title by any specific defendant to any specific tract. There was evidence that the names of other defendants did not appear anywhere in the chain of title to the property which is the subject of the instant case.

Notice is, ordinarily, a fact issue, and does not become a question of law unless the facts are such as to require the law to recognize that notice exists as a matter of law. Under the record presented here, it was a fact issue before the trial court, and that court properly submitted such fact issue to the jury. Appellant's first and second points are overruled.

By her third and fourth points of error, and by her Second Reply Point in her Reply Brief, appellant makes the contention that the foreclosure of District's tax lien was illegal and the judgment and sale was void because (a) it was a foreclosure *in solido* of three different liens in differing amounts on three different pieces of land owned by one not a party to the suit, and (b) because the sale was tainted by a champertous agreement between defendants and District.

As to (a) above, the facts that the one judgment foreclosed on several tracts and ordered them sold in satisfaction of the three different tax liens, i.e., a foreclosure

in solido of the tax liens, constituted error, and the judgment would have been subject to reversal on direct appeal. McPaul v. Byrd, Tex. Civ. App., 174 S.W. 644, n.w.h.; Snell v. Knowles, Tex. Civ. App., 87 S.W.2d 871, 878, wr. dism.; Livingston v. Stubbs, Tex. Civ. App., 151 S.W.2d 285, wr. dis. cor. judg. But such judgment is not void, and is not subject to collateral attack. Snell, supra; Livingston, supra.

We have carefully considered all of the evidence and appellant's points bearing on appellant's claim of illegality in the foreclosure suit, having considered that applying to (a) above and (b) concerning the champerty allegations. It is our conclusion that appellant's points of error 3 and 4 are not well taken, and both are overruled.

We find the evidence sufficient, legally and factually, to support the jury's findings that the defendants were purchasers for value of the property here involved, and the jury did so find. Appellant's contentions to the contrary are overruled.

Appellant, in her seventh point, asserts error in the trial court's definition of "actual notice in law" given in the charge to the jury. The court's definition read:

> "In connection with this Charge, you are further instructed that by the term 'actual notice in law' as used herein, is meant either that he had actual knowledge thereof or that he had knowledge and information of such facts as would put a reasonably prudent person upon inquiry as to whether he was making any claim, from which inquiry, if made, he would have ascertained the facts as to the claim."

Appellant objected to this definition on the grounds among others that it is incomplete, fails to state that the means of knowledge are equivalent to knowledge itself, and fails to state that under notice in law is meant those things which one sought to be charged has express information, and those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed. Appellant also requested that the following definition be given:

> "In common parlance 'actual notice' generally consists in express information of a fact, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which is pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed."

We quote from Champlin Oil & Refining Company v. Chastain, Tex. Sup., 403 S.W.2d 376, on p. 388, as follows:

> "It has been determined by Texas authority that imputed actual notice carries with it the same legal consequences as conscious knowledge. In Hexter v. Pratt, 10 S.W.2d 692 (Tex. Com. App. 1928) it was said:

'Notice in law is of two kinds—actual and constructive. * * * In common parlance "actual notice" generally consists in express information of a fact, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which if pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. * * * *So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.*'[2]

The Hexter case was cited with approval by this Court in Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951), wherein it was said:

'It may well be, however, that the tax attorney and the County were charged with actual notice of the judgment even though they had no express knowledge thereof. Actual notice "embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed." ' "

See, also, Kerby v. Ogletree, Tex. Civ. App., 313 S.W.2d 325, 327, wr. ref. n.r.e.

We hold that the necessary elements of "actual notice" were included in the definition given by the trial court, and overrule appellant's seventh point.

Appellant's eighth and ninth points assert jury misconduct of a prejudicial nature. These contentions were

2. Emphasis added.

made in an affidavit of one of the jury asserting at some length that he and other jurors did not understand and wrongfully applied the definition of "actual notice" contained in the court's charge and appellant's point is based on her asserted error in such definition and the jury's misapplication thereof. The court sustained appellees' special exceptions to the affidavit, and declined to hear testimony. A juror is not guilty of misconduct when, without bringing to the attention of the jury law or facts outside of the record, he misconstrues a portion of the court's charge and argues a misinterpretation to other jurors. Compton v. Henrie, Tex. Sup., 364 S.W.2d 179, 182; Transamerica Insurance Company v. Beseda, Tex. Civ. App., 443 S.W.2d 915, 919, wr. ref., n.r.e. We have held that there was no error in the court's definition. The eighth and ninth points of error are overruled.

Appellant's tenth point of error reads:

> "The Trial Court erred in admitting the hearsay testimony from a former trial of Defendant, F. M. Reising, when Reising was not shown to be dead or disabled and was, in fact, a resident of Edinburg, Texas, since Plaintiff was, thus, denied the opportunity to cross-examine Reising concerning his champertous agreements with the District—a crucial fact which had been discovered since he had testified and been excused at the former trial."

The record establishes that at the time of the 1966 and the 1969 trials F. M. Reising, a resident of Hidalgo County, Texas, had no interest in the property or in the law suit. He and the plaintiff had long theretofore settled all of their claims against each other, and Reising remained in the case only as a nominal party. He had

testified in both the 1949 and 1966 trials. A subpoena was issued for his attendance in court as a defense witness ten days prior to the day the case was set for trial in 1969, but was not served due to his absence from his home county of Hidalgo County, Texas, and from the State. Plaintiff had also secured a subpoena, which was likewise unserved. The case was called for trial in October 1969, defendants requested a postponement, stating that Reising was a necessary defense witness, and that he was and would be for the next ten days out of the State of Texas. The request for postponement was denied.

The court permitted defendants to introduce into evidence portions of the testimony given by Reising over appellant's objections that the evidence was hearsay and self-serving, that the witness was not shown to be dead, insane, physically unable to testify, or residing outside of the jurisdiction of the court; and that the introduction of the former testimony would deprive the appellant of his right of full cross-examination. It is undisputed by appellees that the witnesses' evidence was very material and necessary to their defense, particularly on the issue of notice.

The rule concerning the admissibility of such testimony is stated in White v. Natural Gas Pipeline Company of America, Tex. Sup., 444 S.W.2d 298, on p. 302, as follows:

> "For testimony given by a witness at a former trial to be admissible in a subsequent trial between the same parties in a civil case, Texas courts make three requirements. (1) The former trial must have been on substantially the same issues. (2) At the former

> trial there must have been an opportunity for cross-examination. (3) The witness at the time of the subsequent trial must have been unavailable to testify. The latter is established when it is shown that the witness is dead or insane or physically unable to testify or is beyond the jurisdiction of the court, or that his whereabouts are unknown and that a diligent search has been made to ascertain his whereabouts or that he has been kept away from the trial by the adverse party. The trial court's exercise of discretion in admitting testimony at the former trial is limited to a determination of the factual predicate. Each and every one of these requirements is essential in establishing the proper predicate for the admissibility of the transcript of testimony in another trial. Houston Fire & Casualty Insurance Co. v. Brittian, 402 S.W.2d 509 (Tex. Sup. 1966); Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1951). . . ."

Under the facts shown to the trial court, all three of the above named requirements were present when he overruled appellant's objections to the introduction of this evidence. The trial in 1969 was on substantially the same issues as the former trial. The claim of illegality of the tax judgment due to alleged champerty was an issue in the 1966 trial. The transcript does not contain any amended pleadings filed by either party since the former trial.[3] Appellant was shown to have opportunity for cross-examination on all matters included in the testimony, which right was fully exercised. The witness was shown to have been outside of the State of Texas and beyond the jurisdiction of the court, and there was no effort

3. There was a motion for summary judgment filed by plaintiff in 1969, which was overruled.

made to prove that his absence was caused or joined in by any of appellees having an interest in the law suit. The trial court did not err in overruling Appellant's tenth point of error is overruled.

Appellant's last eleven points of error (Nos. 11-21 incl.) deal with the special issues in the court's charge inquiring of the damages and rental value of the property during the period of appellees' possession and use thereof. Any recovery by appellant of such damages and rental value would depend upon their securing judgment of title to the property. Since the judgment of title is against them, error, if any, in these issues and the jury's answers to them becomes moot and harmless, and we would not be justified in reversing the judgment for such error, if any. Rule 434, T.R.C.P.; Owens v. Rogers, Tex. Sup., 446 S.W.2d 865. These points of error are overruled as showing no reversible error.

JUDGMENT AFFIRMED.

/s/ HOWARD P. GREEN
Howerd P. Green,
Chief Justice

Opinion delivered and
filed this the 23rd
day of July, 1970.

APPENDIX "B"

IN THE 93RD JUDICIAL DISTRICT COURT
OF HIDALGO COUNTY, TEXAS

MARY ELLEN COAKLEY

VS.

F. M. REISING, ET AL.

NO. B-15,954

MARY ELLEN COAKLEY

VS.

SARAH H. CONKLIN, ET AL.

NO. B-15,955

JUDGMENT

On October 13, 1969, the above entitled and numbered causes having been heretofore consolidated came on to be heard by the Court, and all parties having announced ready, there appeared the Plaintiff, MARY ELLEN COAKLEY, in person and by and through her attorneys of record, Johnson and Davis, and F. M. Reising and Sarah H. Conklin, who are nominal parties to said suit came not in person, but their successors in title, CROW GRAVEL COMPANY, CROW IRON WORKS, V. N. CROW, A. R. ROGERS, and RIO GRANDE INDUSTRIES, INC., appeared in person and by and through their attorneys of record, and all parties having announced

ready for trial, a jury of four good and lawful women and eight good and lawful men were duly impaneled and sworn, and having heard the pleadings, the introduction of testimony began and continued until the 17th day of October, 1969, at which time the jury having heard the argument and the evidence, the argument of counsel, on their oath did, for verdict in response to the following special issues submitted to them by the Court, make the following respective findings:

"SPECIAL ISSUE No. 1.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, F. K. Abney had actual notice in law, as that term is herein defined, that Mrs. Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 2.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, F. K. Abney had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands here in question?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 3.

"Do you find from a preponderance of the evidence that at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, A. G. Haigh had actual notice in law, as that term is herein defined, that Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 4.

"Do you find from a preponderance of the evidence, that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, A. G. Haigh had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands in question?

"Answer 'He did have actual notice' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 5.

"Do you find from a preponderance of the evidence, that at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, C. I. Haven had actual notice in law, as that term is herein defined, that Mrs. Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 6.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, C. I. Haven had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands here in question?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 7.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value

of Lot 2, Section 233, from March 1955 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: None."

"SPECIAL ISSUE No. 8.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 14, Section 236, from March 1955 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: None."

"SPECIAL ISSUE No. 9.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 15, Section 235, from October 1957 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: None."

"SPECIAL ISSUE No. 10.

"Do you find from a preponderance of the evidence that Frank Reising had actual notice of the unrecorded deed to J. M. Collins prior to his purchase of the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: No."

"SPECIAL ISSUE No. 11.

"Do you find from a preponderance of the evidence that the Defendant, Sarah Conklin, had actual notice of the deed to J. M. Collins prior to her purchase of the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: No."

"SPECIAL ISSUE No. 12.

"Do you find from a preponderance of the evidence that F. M. Reising paid value for the property purchased by him from the water district?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 13.

"Do you find from a preponderance of the evidence that Sarah Conklin paid value for the property purchased by her from the water district?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 14.

"Do you find from a preponderance of the evidence that the Plaintiff and her predecessors in title remained silent when they should have asserted their interest in and to the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"If you have answered Special Issue No. 14 'Yes,' then answer Special Issue No. 15; otherwise do not answer same."

"SPECIAL ISSUE No. 15.

"Do you find from a preponderance of the evidence that such silence, if you have so found, induced the defendants Reising and Conklin to purchase the property in question?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"If you have answered Special Issue No. 15 'Yes', then answer Special Issue No. 16; otherwise do not answer same."

"SPECIAL ISSUE No. 16.

"Do you find from a preponderance of the evidence that the Defendants would not have purchased the property in question but for the silence or failure of the Plaintiffs and her predecessors in title to assert their claim?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 17.

"Do you find from a preponderance of the evidence that F. M. Reising acted in good faith in purchasing the land in question?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 18.

"Do you find from a preponderance of the evidence that Sarah H. Conklin acted in good faith in purchasing the land in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

Such findings were certified to by James C. Shawn, Jr., Foreman of the Jury, as follows:

"We, the Jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

/s/ James C. Shawn, Jr.
Foreman"

And such findings were received by the Court and were filed and entered of record in the minutes of the Court.

WHEREUPON Defendants having made and the Court having heard and considered a motion for judgment, and also heard and considered a motion for judgment non obstante veredicto as made by the Plaintiff, the Court made such additional considerations and findings as were authorized by the evidence, and the Court being of the opinion that the Defendants' motion for judgment on the verdict should be rendered and that Plaintiff's motion for judgment non obstante veredicto should be overruled, and judgment should be rendered here and now as follows for the Defendants:

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by her said suit against the Defendants, or any of them, and that Plaintiff go hence with her costs and without day.

WHEREUPON Plaintiff, in open Court, duly excepted to the rendition of this judgment and gave notice of appeal to the Court of Civil Appeals for the Thirteenth Supreme Judicial District, sitting at Corpus Christi, Texas.

This judgment is rendered, signed, and entered this 29th day of October, 1969.

/s/ C. W. LAUGHLIN
JUDGE PRESIDING
93rd District Court
Hidalgo County, Texas

APPROVED:

HENRICHSON & BATES
Edinburg, Texas

By /s/ E. G. HENRICHSON
E. G. Henrichson
ATTORNEYS FOR DEFENDANTS

APPROVED AS TO FORM ONLY:

JOHNSON & DAVIS
Harlingen, Texas

By_____
Orrin W. Johnson
ATTORNEYS FOR PLAINTIFF

APPENDIX "C"

TEXAS REVISED CIVIL STATUTES—Article 6627

All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

CERTIFICATE

I, E. G. Henrichson, do hereby certify that a copy of the above and foregoing Reply to Petition for Writ of Certiorari has been served upon Orrin W. Johnson, of Johnson & Davis, 130-138 Texas Reserve Building, Harlingen, Texas, 78550, counsel for Petitioner, by depositing a copy of said Reply in the United States Post Office, first class postage prepaid, this 9th day of March, 1971.

E. G. Henrichson

E. G. Henrichson